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Nos. 85-792 and 85-793

In the Supreme Court of the United States

October Term, 1985

INTERSTATE COMMERCE COMMISSION,
Petitioner,

vs.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

vs.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS

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QUESTIONS PRESENTED

1. Do the provisions of 49 U.S.C. § 11341(a) preclude railroads participating in a trackage rights transaction from abiding by the requirements of the Railway Labor Act, 45 U.S.C. §§ 151-160, and their contractual obligations to their employees?

2. Whether any immunization from the Railway Labor Act and employee contractual obligations provided a rail carrier by 49 U.S.C. § 11341(a) must be supported by findings of necessity by the Interstate Commerce Commission, which findings specify the extent such immunization is necesssary to carry out the transaction?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

STATEMENT

This case involves a trackage rights transaction "approved by or exempted by the [Interstate Commerce Commission]" under provisions of the Interstate Commerce Act, 49 U.S.C. §§ 11341-11351, and calls upon the Court to decide whether the immunity provisions of 49 U.S.C. § 11341(a), which provide that a "person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction," relieve the involved rail carriers from the Railway Labor Act and contractual obligations to their employees. If 49 U.S.C. § 11341(a) does exempt the participating carriers from those obligations, the question arises whether the Interstate Commerce Commission must make findings of necessity and must specify the extent to which the exemption is necessary to carry out the transaction.

Respondent Brotherhood of Locomotive Engineers ("BLE") is a railway labor organization, national in scope and organized in accordance with the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-160. BLE is the representative for the craft of locomotive engineers on almost all of the nation's railroads, including the rail carriers in this proceeding, Union Pacific Railroad Company ("UP"), Missouri Pacific Railroad Company ("MP"), Missouri-Kansas-Texas Railroad Company ("MKT") and Denver & Rio Grande Western Railroad Company ("DRGW").

The BLE is not a monolithic institution, for the locomotive engineers on each railroad are represented by a separate general committee of adjustment, which negotiates the working or so-called schedule agreements concerning

rules, rates of pay, and working conditions in effect on that carrier, and those agreements cover matters such as seniority and rights to runs. *See, e.g., General Committee v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323, 325 (1943).[1] Railroad working agreements are extensive and also are "intricate and technical," and require a perusal of "usage, practice and custom" to properly understand them. See *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 567 (1946). In the past several decades, however, national bargaining has taken place between the International BLE and the National Railway Labor Conference, as the representative for most of the nation's Class I railroads in national handling of certain issues, so that the rates of pay for engineers on MP, MKT and DRGW are similar.

A. Historical Background

As petitioners perceive, a review of the historical background of section 11341(a) is necessary to resolve this case. However, petitioners' summary of that history is restrictive and, in limiting itself to the congressional policy to eliminate redundant rail facilities through consolidations, serves to distort the congressional intent regarding application of the RLA and continuation of collective bargaining rights. Moreover, unless one looks at the employee protections accompanying that history, the dilemma confronting the respondent unions in 1982 and 1983 is not disclosed.

Although section 11341(a) had its origin in the Transportation Act of 1920, Pub. L. No. 66-152, ch. 91, § 407(8), 41 Stat. 456, 482 (1920), the first provision for the protection of railroad employees appears in the Emergency Rail-

1. Standing Rule 33(a) of BLE's Constitution states: "The General Committee of Adjustment shall have full power to settle all questions of seniority and rights to runs and jurisdiction of territory that are presented to it. . . ."

road Transportation Act of 1933 ("ERTA"), Pub. L. No. 68, ch. 91, Sections 1-17 and 209, 48 Stat. 211-217 and 221 (1933). The ERTA, among other things, provided for the appointment of a Federal Coordinator of Transportation who was given the duty of preventing unnecessary duplication of services and facilities. Containing the first recognition by Congress of the principle of employee protection against the adverse effects of mergers, Section 7(b) of ERTA provided, in part, a formula below which employment levels could not fall in a given year and that no "employee be deprived of employment such as he had during said month of May [1933] or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title." (48 Stat. 214).[2]

The ERTA also provided for various studies to promote the purposes of the Act. In his 1934 Report to Congress, the Coordinator, Commissioner Joseph B. Eastman, examined the issue of which employees should be retained as a result of reductions in labor requirements by consolidations. H. R. Doc. 89, 74th Cong., 1st Sess. (Jan. 30, 1935). Commissioner Eastman noted these adjustments were difficult and often were "accompanied by much bitterness and disappointment, which in turn . . . seriously affected the morale of the employees concerned and the service rendered by them." *Id.*, 89. He also suggested

2. Section 7(d) directed the Federal Coordinator to require the railroads to compensate employees for financial losses caused by reason of moving to follow their work when transferred under authority of the statute:

> The Coordinator is authorized and directed to provide means for determining the amount of, and to require the carriers to make just compensation for, property losses and expenses imposed upon employees by reason of transfers of work from one locality to another in carrying out the purposes of this title.

that a simple formula of employee selection based on seniority be legislated. This proposal was never acted upon, for as one commentator has stated, "Any necessity for such action was averted by the national railroad labor organizations, which demonstrated adequate capacity to intervene effectively in these seniority disputes." Kahn, *Seniority Problems in Business Mergers*, 8 INDUSTRIAL AND LABOR RELATIONS REVIEW 361, 366 (1954).

The various unions adopted constitutional provisions that list the considerations to be observed in allocating the work and the procedures to be followed selecting the employees to perform that work. *Id.* Generally, these constitutional principles grant the employees involved in transfers, consolidations, coordinations, abandonments, and other railroad financial transactions the right to follow their positions or work with their seniority rights. *Id.*, 371-372.[3]

The effective period of the ERTA was extended by proclamation of President Roosevelt to June 17, 1936, at which date it expired. On May 21, 1936, at the request of the railroad labor organizations and as the result of substantial government pressure, an agreement was signed by the unions and most of the nation's carriers, which is commonly referred to as the "Washington Job Protection Agreement ("WJPA" or "Washington Agreement"). *Id.*

3. BLE's Constitution contains comprehensive provisions concerning questions as to seniority and rights to runs arising from mergers, consolidations, coordinations, controls, absorptions, diversions of traffic, purchases or any other action whereby separate facilities or operations of railroads are going to be unified. BLE Constitution, Standing Rules 34-37 (1981). In general, the organic law specifies that "the engineers on the road, or roads, or any portion thereof, affected thereby, shall retain their right and seniority, as heretofore, on the roads absorbed, traffic diverted, consolidated, merged, leased or coordinated; but the runs shall be manned by the engineers of the respective roads in proportion, as near as practicable to the car miles or train miles in road service and to the engine hours or inbound car count in yard service, in the territory involved on each road."

This document, which is still in effect, provides for certain monetary allowances for dismissals and displacements resulting from "coordinations." See appendix in *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298, 315 (1954) for text of WJPA. Section 2(a) defines "coordination" as "joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities." Section 4 of the WJPA requires "each carrier contemplating a coordination to give at least ninety (90) days written notice of such intended coordination," and section 5 provides "for the selection of forces from the employees of all carriers involved" and their assignment necessitated by the coordination "on the basis of an agreement between the carriers and the organizations of the employees affected, parties hereto."[4]

In sum, the WJPA provides some measure of financial protection to employees adversely affected by displacements or dismissals as a result of a "coordination" and through the notice and negotiation provisions a means of protecting the affected employees in their seniority rights and places and types of work.

4. Until this case, the Interstate Commerce Commission had concluded that the WJPA was the foundation for the Commission formulated employee protections and that its provisions had been embodied therein:

> Beyond doubt, the Washington Agreement was the foundation upon which all employee protective plans have been constructed. It was the basis for the legislation from which evolved section 5(2)(f). And in framing the conditions to be imposed in this proceeding, we relied upon our holding in the *New Orleans Case* that imposition of the provisions of the Washington Agreement, subject to limitations discussed therein, would provide the fair and equitable arrangement commanded by the statute.

Southern Ry. - Control - Central of Georgia Ry., 331 I.C.C. 151, 164 (1967).

Although Title I of the ERTA expired, the merger provisions of the Transportation Act of 1920 continued in effect. Section 5(4) of the Interstate Commerce Act, which was added by the 1920 Act, Pub. L. No. 66-152, ch. 91, 407(4), 41 Stat. 456, 481, and amended by the ERTA, provided that the ICC could authorize consolidations "upon the terms and conditions and with the modifications so found to be just and reasonable." In *United States v. Lowden*, 308 U.S. 225, 234 (1939), this Court affirmed the Commission's power to impose employee protections as "just and reasonable" conditions in the public interest, and said:

> One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation, has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system.

While the Transportation Act of 1940, Pub. L. No. 785, ch. 722, 54 Stat. 899 (1940), liberalized the consolidation and merger provisions of the Interstate Commerce Act, Congress, which was thoroughly aware of the effects on railroad employees, added section 5(2)(f) and for the first time specifically required the protection of railroad employees affected by transactions, *i.e.*, mergers, consolidations, acquisitions of control, leases, and acquisitions of trackage rights.[5]

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5. Section 5(2)(f) [which, as amended, is now 49 U.S.C. § 11347] provides:

> As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad

(Continued on following page)

Subsequently, the Commission held that it could not impose employee protective conditions in abandonment proceedings. This Court, however, affirmed the decision of the district court that the Commission had this power in the "public convenience and necessity", which concept was as broad as the "public interest" phrase used in the Transportation Act of 1920, and stated in regard to labor protection:

> [I]f national interests are to be considered in connection with an abandonment, there is nothing in the Act to indicate that the national interest in purely financial stability is to be determinative while the national interest in the stability of the labor supply available to the railroads is to be disregarded. On the contrary, the *Lowden* case recognizes that the unstabilizing effects of displacing labor without protection might be prejudicial to the orderly and efficient operation of the national railroad system.

Footnote continued—

> subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

The Transportation Act of 1940, Pub. L. No. 785, ch. 722, § 7, 54 Stat. 899, 906-07 (1940).

Interstate Commerce Commission v. Railway Labor Exec. Ass'n., 315 U.S. 373, 377 (1942).

The process then began by which the Commission developed the employee protective conditions imposed by it. At first the Commission reserved jurisdiction to consider the protections to be imposed if it was later informed that the employees had actually been affected adversely. *Minneapolis & St. L. R.R. - Reorganization*, 244 I.C.C. 357 (1941). In 1944, the Commission detailed five conditions intended to protect employees in a purchase for a period of four years from the effective date of its order. *Oklahoma Railway Trustees - Abandonment of Operations*, 257 I.C.C. 177 (1944). Later, the Commission took the position that the four years was a maximum and employees first adversely affected after that period would have no protection, but this Court, in reversing that decision in *Railway Labor Exec. Ass'n. v. United States*, 339 U.S. 142, 155 (1950), concluded from a reading of the legislative history of section 5(2)(f):

> The Commission has the power to require a fair and equitable arrangement to protect the interests of railroad employees beyond four years from the effective date of the order approving the consolidation.

Upon remand, the Commission, in promulgating the so-called *New Orleans* conditions that subsequently were imposed in numerous cases, said: "From the beginning we have patterned the conditions which we have prescribed after the Washington Agreement." *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271, 280 (1952).

This rationale was reaffirmed in a decision on remand in *Southern Ry. - Control - Central of Georgia Ry.*, 331 I.C.C. 151, 164 (1967). More importantly, the Commission

expressed its views—at that time at least—that it did not have authority to supersede collective bargaining agreements; the employees' rights under those agreements were independent of any rights they had under the Commission approved conditions; the Commission conditions applied "after the carriers have arrived at their adjustments of the labor forces *in accordance* with the governing provisions of their collective bargaining agreements so that the carriers may be enabled to carry an approved transaction into effect" (citing *Texas & N.O. R.R. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962)); and the transportation and labor laws were to be accommodated. *Id.*, 168-170.

In enacting the Rail Passenger Service Act of 1970 ("RPSA"), Pub. L. No. 91-518, 84 Stat. 1327 (1970), the Congress provided for employee protection upon the transfer of passenger services from the railroads to the National Railroad Passenger Corporation (AMTRAK).[6] Section 405(a) of RPSA, 45 U.S.C. § 565(a), provides that "a railroad shall provide fair and equitable arrangements to protect the interests of employees affected by discontinuance of intercity rail passenger service," and section 405(b), 45 U.S.C. § 565(b), requires that those protective arrangements include provisions for:

> (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
>
> (2) the continuation of collective bargaining rights;

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6. The language was taken from section 10(c) of the Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, 78 Stat. 302, 307 (1964), subsequently renumbered as section 13(c), Pub. L. No. 89-562, Sec. 2(a)(1), 80 Stat. 715. *See* 49 U.S.C. § 1609(c).

(3) the protection of individual employees against a worsening of their positions with respect to their employment; * * *.

The Secretary of Labor prepared a set of protective conditions and certified its compliance with 45 U.S.C. § 565(b). *See Congress of Railway Unions v. Hodgson,* 326 F. Supp. 68 (D. D.C. 1971).

Subsequently, section 402(a) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 62, amended section 5(2)(f) of the Interstate Commerce Act [now 49 U.S.C. § 11347], by including the following sentence:

> Such arrangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to [section 5(2)(f) of this act] and *those established pursuant to section 405 of the Rail Passenger Service Act* (45 U.S.C. 565). (Emphasis supplied).[7]

After several years following the 1976 amendments and many Commission proceedings, the ICC fashioned conditions for use in abandonment cases in *Oregon Short Line R.R. - Abandonment - Goshen,* 360 I.C.C. 91 (1979); in merger, control and consolidation cases in *New York Dock Ry. - Control - Brooklyn Eastern District Terminal,* 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry. v. United States,* 609 F.2d 83 (2d Cir. 1979);[8] and in trackage

7. The 1976 Act also made imposition of similar employee protective conditions in abandonments mandatory. 49 U.S.C. § 10903(b)(2).

8. In *New York Dock Ry. v. United States,* the Second Circuit found the unions' historical treatment of labor protective arrangements more persuasive than those advanced by the amicus American Association of Railroads. ("AAR") 609 F.2d *supra* at 93, n.11.

rights cases in *Norfolk and Western Ry. - Trackage Rights - BN,* 354 I.C.C. 605 (1978), *as modified by Mendocino Coast Ry. - Lease and Operate - California R.R.,* 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Exec. Ass'n. v. United States,* 675 F.2d 1248 (D.C. Cir. 1982).

These conditions contain the notice and negotiation sections of the WJPA and the *New Orleans* conditions, much of the protection formulated by the Secretary of Labor under 45 U.S.C. 565, and the following prohibition against interference with RLA and contractual obligations:

> 2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

See 360 I.C.C. at 84, 99.

On October 14, 1980, Congress enacted the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895. Though significantly deregulating the railroad industry, Congress continued to provide for the protection of employees in regard to every action where they could be affected. *See e.g.,* 49 U.S.C. § 10505(g) ("Commission may not exercise its authority under this section . . . (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle"); 49 U.S.C. §§ 10910, 11123(a)(3) ("Commission shall require to the maximum extent practicable the use of the employees who would normally have

performed work in connection with the traffic subject to the action of the Commission").[9]

B. The Instant Dispute

On September 15, 1980, UP, MP and several other corporations filed applications with the ICC for authority under 49 U.S.C. §§ 11343 and 11344 to form a railroad system covering a substantial portion of the country west of the Mississippi River. The applications were opposed by a number of persons, including petitioner MKT, DRGW and the respondent unions, BLE and United Transportation Union ("UTU"). DRGW and MKT later filed responsive applications seeking trackage rights. In its application for trackage rights over various UP and MP tracks, including Kansas City and Omaha, MKT proposed using its own employees in operations. J.A. 164. DRGW, on the other hand, set out that it "'may, at its option, elect to employ its own crews for the movement of its trains, locomotives and cars'" over MP tracks. J.A. 165. In fact, Mr. A. H. Nance testified for DRGW before the ICC that DRGW would be "willing to sit down and work out any kind of arrangement you [UP-MP] want." J.A. 166.

On October 20, 1982, the Commission entered its decision approving the primary applications, subject to various conditions. *Union Pacific - Control - Missouri Pacific R.R.*, 366 I.C.C. 462 (1982), *aff'd in part sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1172 (1985). One

9. Although railroad employment stood at 1,226,421 in 1952, when the *New Orleans* conditions were fashioned, it dropped to 458,994 in 1980, when the Staggers Act took effect, and has further declined to 301,879. 1985 *Moody's Transportation Manual* page a29; ICC Bureau of Accounts A-300 Report for 1985. Though the consolidations may have resulted in a more efficient rail transportation system, they have not preserved jobs for rail labor as suggested by the amicus AAR (AAR Brief, p. 12).

of the conditions imposed was that MP and UP had to grant DRGW the right to operate over 619 miles of MP trackage from Pueblo, Colorado to Kansas City, Missouri, 366 I.C.C. at 572. Another condition was that MKT, among other things, was to be given the right to operate over MP tracks from Kansas City to Omaha and from Union, Nebraska to Lincoln, Nebraska, and also over UP tracks from Omaha to Council Bluffs, Iowa, a distance over 200 miles. 366 I.C.C. at 465.

As MP and UP had opposed the trackage rights requests of MKT and DRGW, the Commission did not have actual agreements before it when considering those applications. Therefore, the ICC decided:

> No agreements have been reached between the parties regarding the trackage rights for which we have found a need. We prefer that the parties set the terms of their trackage rights agreements wherever possible, and then seek our approval as required, 49 U.S.C. 11343. In the event the parties should be unable to reach agreement, we will set the terms for the trackage rights.

366 I.C.C. at 589.

Several other items were left unsettled, including revision of MKT's operating plan as unrealistic (*id.* at 569).[10]

10. The ICC suggested that MKT revise its plan "to provide for service using two crews with the crew change occurring at an appropriative point between Kansas City and Omaha. Although operations using two crews would be more costly than using one crew, such operations appear feasible and could prevent operating problems relating to hours of service laws." This quotation points out that, at that time, the Commission did not consider 49 U.S.C. § 11341(a) as automatically immunizing MKT from the Hours of Service Act, 45 U.S.C. §§ 61-66, and other federal safety laws.

Other than this comment, the Commission made no reference to and cannot be viewed as having considered and decided that MKT or DRGW engineers should operate the trains over UP-MP tracks (*see* 366 I.C.C. 568-569, 572-578). In fact, the Commission's opinion is totally silent on crew selection. At several places in its opinion, the Commission discloses the criteria (*id.*, 562-565) and the monetary considerations upon which it bases its granting of various trackage rights (*id.*, 589-590). But, nowhere can one find any reference to crew manning by the Commission.

Although, as petitioners state, the unions, including BLE and UTU, may not have directed their challenges specifically to the subject of which crews would man the trackage rights trains, they did seek modification and expansion of the customarily imposed conditions due to the anticipated magnitude of the labor impacts and the time period they would cover. In response to the unions' arguments, the Commission said (*id.*, 621-622):

> As is our usual practice, we will impose the conditions specified in *Norfolk and Western Ry. Co. - Trackage Rights - BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc. - Lease and Operate*, 360 I.C.C. 653, 664 (1980) on the trackage rights approved as part of the primary application.[138] Similarly, in the DRGW, SP, and MKT responsive trackage rights applications which we are approving, . . . we find that employees will be adequately protected by imposition of protective conditions specified in *NW-BN*, as modified in *Mendocino*. *Railway Labor Executives Ass'n. v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

138. The *NW-BN-Mendocino* conditions are similar to the *New York Dock* conditions, but are applied in the context of trackage rights proceedings. The imposition of these conditions here is a matter of consistency but has little practical significance, since *all affected employees of applicants will also be covered by the New York Dock conditions imposed on the primary transaction.* (Emphasis supplied).

Clearly, on October 20, 1982, the ICC did not view its order as decisive of labor relations matters, and did not indicate that it had ruled on crew assignments.[11]

Both sets of employee protection conditions imposed required the rail carriers to which they related to preserve all "rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . under applicable laws and/or existing collective bargaining agreements or otherwise. . . ." 354 I.C.C. at 610; 360 I.C.C. at 84. Further, as previously explained, both sets of conditions require advance notice of the transaction to all "interested employees" and their employee representatives and negotiation of an agreement to provide for, among other things, "the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case. . . ." *See,* Article I, Section 4 of the *New York Dock* conditions, 360 I.C.C. at 85; and *Norfolk & Western* conditions, 354 I.C.C. at 610.

None of the carriers involved (MP, MKT or DRGW) gave the MP locomotive engineers represented by BLE

11. As a final note on labor protection, the Commission rejected two conditions raised by the American Train Dispatchers Association, one of which requested an order providing that "no transfer of [Western Pacific] or MPRR train dispatching work, or transfer of certain train dispatchers be accomplished without further order of the Commission after notice and opportunity for a hearing." The Commission rejected the imposition of a notice and hearing requirement as "unduly burdensome" and held "in the event employees might be impacted in the future, as a result of this consolidation, they will be afforded the protections we have imposed here."

the advance notice prescribed by the employee protective conditions. On November 5, 1982, DRGW entered into a stipulation with the UP-MP "setting interim compensation terms and providing for the applicants to provide operating assistance to DRGW in implementing the trackage rights." J.A. iii, No. 22, Decision in Finance Docket No. 30,000 (Sub-No. 18). Thereafter, DRGW began its trackage rights operations over MP tracks with MP crews manning its trains. J.A. 6. In early January 1983, MKT began to perform the trackage rights operations under an agreement in principle reached with UP-MP in November 1982. J.A. 74. Unlike DRGW, however, MKT used its own employees.

On February 1, 1983, MP advised its engineers represented by BLE of the trackage rights granted DRGW between Pueblo, Colorado, and Kansas City, Missouri and, for the first time, informed them that "MP and D&RGW have entered into an agreement that provides for using MP crews on D&RGW trains for a temporary, interim period, after which they will operate the trains with their crews." *Id.* After pointing out that at some point DRGW planned to have sufficient tonnage to run trains consisting of their own tonnage, MP stated:

> The exact date D&RGW will start using their crews on their trains is not known at this time. However, when D&RGW lets us know when they will start manning their trains, we will give you this information.

Id.

BLE then protested the use of DRGW and MKT crews on MP trackage on the ground that DRGW and MKT engineers did not have the right to operate trains over

MP trackage and that the agreements between the railroads resulted in an unauthorized change of working conditions in violation of the RLA. The railroads took the position that the Commission's order required the use of DRGW and MKT crews.

Unknown to BLE, the respondent UTU had threatened to strike MP for allowing MKT crews to operate trains over MP tracks, and MP obtained a strike injunction on March 30, 1983. *Missouri Pacific R.R. v. United Transportation Union*, 580 F. Supp. 1490, 1507 (E.D. Mo. 1984), *aff'd*, 782 F.2d 107, 110 (8th Cir. 1986), *petition for cert. filed*, 54 *U.S.L.W.* 3463 (U.S. Dec. 18, 1985) (No. 85-1054).

Shortly thereafter, on April 4, 1983, BLE filed a Petition for Clarification with the ICC in which it asked the Commission to clarify its October 20, 1982 decision as to crew manning. BLE pointed out that its understanding of the situation was reached from recent communications from MP that the ICC order mandated use of the DRGW and MKT crews. BLE noted that the protections imposed by the ICC did not require the tenant lines to use their employees to operate the trains or "even purport to treat with this subject." J.A. 4.

BLE stressed that interpreting the protections as mandating the use of DRGW and MKT crews "would be contrary to the purposes of the Interstate Commerce Act" by leading to "payment of displacement and dismissal allowances to MP crews who would be needlessly affected by the transaction by the hiring of new employees to perform this work" and by payment of removal allowances to employees of DRGW and MKT required to transfer, "thereby reducing the economics and efficiencies con-

templated by the Commission's approval of these transactions." J.A. 4. Moreover, BLE asserted that the Commission did not have jurisdiction over crew assignments and manning of positions, a holding that the Commission had historically applied in numerous previous decisions. J.A. 4.

The Commission denied BLE's petition in an order served on May 18, 1983. In that decision, the Commission concluded: "The consolidation decision does not require clarification." Pet. App. 53a. To the Commission, BLE was "attempting to reargue an issue that has already been decided." Pet. App. 54a. In sum, the Commission held that it had jurisdiction of crew assignments and manning of positions and that it naturally followed that DRGW and MKT could use their own crews.

On May 31, 1983, BLE filed with the ICC a "Petition for Reconsideration" of its May 18 order, J.A. 48-54. BLE stated that the Commission had "failed to consider its prior precedent on the issue which unequivocally hold that the subject of crew assignments and manning are labor disputes to be adjusted under the procedures of the Railway Labor Act." J.A. 49. In addition, BLE contended that "the Commission's ruling contravenes Section 2 of Article I of the New York Dock protective conditions imposed by the Commission in this docket and thereby is not in accord with the statutory mandate set forth in 49 U.S.C. 11347." *Id.*

Indicating the decision authorizing use of the lessee railroad's crews was contrary to the policy set forth in the Interstate Commerce and Railway Labor Acts, BLE made the following conclusion and prayer for relief:

> In sum, the Brotherhood of Locomotive Engineers submits that the Commission does not have jurisdiction over these labor disputes since such matters are within the purview of the Railway Labor Act, and respectfully requests that the Commission grant this petition for reconsideration and issue an order holding that crew assignments and manning of positions are matters not within the jurisdiction of the Commission but are labor disputes to be resolved under the procedures of the Railway Labor Act.

J.A. 54.

On June 7, 1983, UTU also petitioned ICC for reconsideration of its May 18, 1983 order, J.A. 71-84. UTU asked the ICC to rule that its order had not relieved any railroads from their obligations under the Railway Labor Act or the conditions imposed to protect the interests of the railroad employees.

The Commission denied the petitions for reconsideration on October 25, 1983. Pet. App. 60a. The ICC held that it had jurisdiction under 49 U.S.C. § 11341(a) to exempt a transaction approved under 49 U.S.C. §§ 11343 and 11344 from the provisions of the Railway Labor Act. Pet. App. 54a. Having found the power to exempt, the Commission then held that the exemption automatically flowed from its order:

> The terms of section 11341 immunizing an approved transaction from other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is expressly relieved from certain restraints.

Pet. App. 60a.

In December, 1983, BLE and UTU filed with the District of Columbia Circuit petitions for review of the ICC's orders of May 18, 1983 and October 25, 1983. Among other things, the unions argued in their petitions that the ICC exceeded its authority by exempting the carriers from the requirements of the Railway Labor Act in regard to crew selection and assignments and that this action contravened the employee protection requirements of 49 U.S.C. § 11347 and the *N&W* conditions imposed in the ICC's approval of the trackage rights applications of DRGW and MKT pursuant to Section 11347.

On May 3, 1985, the Court of Appeals in a 2-1 decision vacated the ICC's decision, stating:

> We thus vacate the 1983 orders and leave the parties to their Railway Labor Act remedies. In doing so we intimate no view on the merits of the unions' claims about their underlying right to a role in crew selection. The Railway Labor Act is designed to resolve such issues, and we leave the parties to the mechanism created by Congress.[10]

10. The dissent professes some puzzlement at the reason for vacating the ICC decisions. The reason is clear. This issue belongs within the structure created by the Railway Labor Act. Holding so does not assume "a conflict between the approved crew selection provisions and the unions' asserted rights." Dissent at 8. Rather, it leaves that question to the mechanisms created by Congress. That, of course, is the reason we do not "indicate what the parameters of the unions' claimed rights might be," id.: under the statutory scheme, it is not, at this point, our province to do so. All we decide is that ICC's claimed exercise of exemption authority was insufficient to immunize crew selection from the provisions of the Railway Labor Act.

Pet. App. 21a. The dissent, on the other hand, accepted the Commission's argument that the exemption from the Railway Labor Act was self-imposed by reason of 49 U.S.C. § 11341.

Subsequently, the Commission and the affected railroads petitioned for rehearing with suggestion for rehearing en banc. On July 12, 1985, the panel *sua sponte* amended its opinion so as to delete footnote 10, *supra*, and to modify the concluding paragraph of the majority opinion so as to remand the proceeding to the Commission. According to the majority of the panel of the Court of Appeals (Judges Wright and Mikva), the Railway Labor Act dispute resolution procedures may not be dispensed with by the ICC without an adequate finding of necessity for doing so, and the Commission had never given a reasion for removing crew selection from the Railway Labor Act bargaining process, Pet. App. 45a.

The petition for rehearing and suggestion for rehearing en banc were denied by the court below in orders dated August 9, 1985. Pet. App. 48a-50a. On March 24, 1986, this Court granted the petitions of the ICC and MKT for writs of certiorari to the District of Columbia Circuit Court of Appeals.[12]

SUMMARY OF ARGUMENT

Although rights to runs and crew assignments are vital to the livelihood of railroad operating employees, as demonstrated by decades of prior practices in the rail industry, Commission imposed crew requirements have not been and are not now essential to effectuation of a Commission approved transaction. Over the years there has been little controversy between the operating employees and their carriers as to the selection of the employees operating the

12. The cross-petitions of BLE and UTU for certiorari are pending. (Nos. 85-983 and 85-997).

trains following consolidations or other ICC approved transactions, and there have not been any interruptions to commerce resulting from those issues. As a result, the Commission has not intervened in crew selection matters and, in fact, has professed lack of jurisdiction and expertise in these and other collective bargaining items. *Southern Railway - Control - Central of Georgia Ry.*, 331 I.C.C. 151, 170 (1967); *Illinois Central Gulf R.R. - Trackage Rights - Chicago & Illinois Midland Ry. Co.*, Finance Docket No. 28046 (Feb. 15, 1977). J.A. 7-8.

While the Commission's authority may be broad, it is not unbridled. *Northern Lines Merger Lines*, 396 U.S. 491, 503 (1970). The decision question must be answered with substantial evidence, and the Commission must reveal the standards it employed in reaching that decision. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196-197 (1947). Here, the Commission "never offered a word about waiving the Railway Labor Act with respect to the crew assignment in the trackage rights, much less the necessity for doing so" in its 1982 consolidation opinion. Pet. App. 19a. And while in its 1983 decisions arising from BLE's petition for clarification the ICC claimed that section 11341 had automatically relieved the carriers from their RLA and collective bargaining obligations upon issuance of its order approving the consolidation, the Commission never gave any justification for its new interpretation or for the change in its policy related to crew assignments and other collective bargaining matters, as it was required to do (*see NLRB v. Local Union No. 103, Int'l. Ass'n. of Bridge, Structural and Ornamental Iron Workers*, 434 U.S. 335 351 (1978)), nor did the Commission "give a shred of reasoning to support its view that completion of the transactions required shielding crew selection from the RLA," or the

notice and negotiation provisions of its own employee protective conditions. Pet. App. 19a.

In addition to the fact that the Commission has never considered crew assignment a subject to be decided by it and, therefore, has never taken evidence upon the economic aspects of such selection, no opportunity exists today for the Commission to hear and decide the issue in almost all cases. Except when part of a responsive application in a consolidation proceeding under sections 11343 and 11344, trackage rights transactions are handled under exemption procedures, which merely require the person engaging in the transaction to file a notice. *See, e.g.*, 49 C.F.R. § 1180.2 *et seq.*

Moreover, though the Commission and the MKT claim that the employee protective conditions imposed by the Commission pursuant to 49 U.S.C. § 11347 give the affected employees monetary protection from the adversities arising from the unilateral labor relations decisions made by the carriers by reason of the self-executing exemption allegedly contained in 49 U.S.C. § 11341, the Commission has taken further actions that, in some instances, deprive the employees of that protection which it argues serves as the basis of the exemption. *See, e.g., Simmons v. ICC*, 766 F.2d 1177 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 791 (1986), which upheld an order of the ICC refusing to impose labor protective conditions upon a rail carrier that applied to abandon a line of rail and then sold it.

Thus, the reading of the language contained in section 11341(a) is extended too far by the Commission when it goes beyond the clear meaning of the wording that the transaction is exempt "from all other law . . . *as necessary to let that person carry out the transaction.*" (Emphasis

supplied). At no time or place has the Commission informed anyone as to why crew assignments in trackage rights cases in general and in this case in particular may not be negotiated and why that labor relations matter has been exempted from the procedures of notice and negotiation under the RLA. The Commission did not so find, and the courts should not accept later rationalizations for its actions. *See Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962).

Moreover, the Commission's actions were defective in never having attempted to accommodate the provisions of the ICA and RLA. *Id.* at 172. Since the Commission-formulated employee protective conditions provide for notice and negotiation, and to that extent are no different than the procedures of section 6 of the Railway Labor Act, 45 U.S.C. § 156, the two Acts can be accommodated. *See* 354 I.C.C. at 610-611; 360 I.C.C. at 85.

With respect to the RLA, however, it appears to be beyond question that Congress has not manifested any intention to abrogate that Act. *Schwabacher v. United States*, 334 U.S. 182 (1948). Every amendment of the ICA, while providing carriers the opportunity to more easily obtain certain economies and efficiencies, has carried with it employee protections which embody the preservation and continuation of collective bargaining rights and the rates of pay, rules and working conditions in effect. At each stage of the historical development of the ICA, the protection of employees has been considered and broadened. Therefore, one cannot conclude, as the Commission suggests, that Congress manifested an intention to abrogate the RLA insofar as Commission approved or exempted transactions, when it has specifically provided

for the continuation of the collective bargaining rights, the employment rights and the statutory rights of rail workmen at various points of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (Oct. 14, 1980), and other railway legislation. In sum, those actions are not indicative of a congressional policy intended to deprive employees of a voice in the process of determining which persons may run the trains engaged in Commission approved trackage rights operations.

This Court in *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962), warned the ICC not to contravene the national policy as to labor relations or to invade the authority of the agencies given that jurisdiction. And in *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 339-340 (1960), the Court confronted with a similar kind of argument by the railroads said: "There is no express provision of law, and certainly we can infer none from the Interstate Commerce Act, making it unlawful for unions to want to discuss with railroads actions that may vitally and adversely affect the security, seniority and stability of railroad jobs."

The RLA has long served as the basis for labor management harmony and industrial peace in the railroad industry. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 379 (1969). Although arguments have been advanced to substitute compulsion and anti-strike measures in place of the RLA, the RLA and its promotion of collective bargaining have been "thought essential by Congress" in the operation of an efficient interstate rail system. *See United Transportation Union v. Long Island R.R.*, 455 U.S. 678, 688-689 (1982).

ARGUMENT

THE COMMISSION MUST ENTER FINDINGS OF NECESSITY IN ORDER TO RELIEVE A CARRIER FROM ITS RAILWAY LABOR ACT AND CONTRACTUAL OBLIGATIONS TO NEGOTIATE UPON CREW MANNING ISSUES WITH ITS EMPLOYEES.

The Court of Appeals correctly held that the Commission's approval of a transaction under section 11344 of the ICA is insufficient to exempt a rail carrier from its obligations under the RLA and its labor contract unless the ICC gives a reasoned explanation why crew selection is so essential to the " 'pro-competitive' purpose that the otherwise applicable provisions of the Railway Labor Act must be waived." Pet. App. 19a-20a & n.8. Consistently in the years prior to the time that the involved applications were approved and BLE filed its petition for clarification, the ICC had rejected any jurisdiction over crew manning and denied having any expertise in labor relations matters. Moreover, the employee protective conditions specifically required the existing rates of pay, rules and working conditions set forth in the collective bargaining agreements be maintained until changed by agreement or applicable statute, and contained a notice and negotiation procedure for the selection of work forces. In addition, the Commission had rejected evidence on the items that it now asserts BLE and UTU failed to present proof. Accordingly, BLE assumed—we submit appropriately—that the ICC would not change its mind—at least not without some notice and sufficient reasons for its new interpretation—and would through clarification of its order of October 20, 1982, inform the parties of the procedures available to determine crew manning.

Under well-established principles, the ICC was required to make a specific finding that the exemption from the RLA and existing collective bargaining agreement provisions was necessary and to provide sufficient reasons for that determination.[13]

In addition, the holding below was consistent with all legal precedent. Furthermore, until the briefs were filed herein, the Commission never attempted to justify its position that a self-executing exemption from the RLA is required and that any procedure for employee participation, whether under the RLA or the Commission imposed conditions, would hinder the consolidation. In fact, by reason of the Commission's newly promulgated class exemption procedures—and its refusal to prescribe protective conditions in many instances—there is no forum to "decide"

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13. The Government argues in a footnote (see Govt. Brief, p. 22, n.16) that the Court of Appeals improperly expanded the scope of its review, because (a) the unions' petitions for review were timely only for the purpose of reviewing the Commission's denial of BLE's petition for clarification, and (b) the unions failed to present any evidence before the ICC that the UP-MP employees "have rights under collective bargaining agreements to participate in the trackage rights crew selection." However, as the court below appropriately held (Pet. App. 12a), based upon precedent in these matters and the "ICC's general pronouncement that the labor protective conditions would not be violated," the issue of crew assignment under those labor protection conditions "did not become ripe for review until the Commission had specified that crew selection was exempt from all otherwise applicable legal requirements." This issue cannot be conceivably related to the Commission's final consolidation decision as suggested by the Government. As to the suggestion that the unions failed to present evidence of collective bargaining rights, we note that (1) the Commission generally would not accept that evidence as significant, (see *infra*, at 28-33); (2) the Commission in giving short shrift to BLE's petition did not consider the labor contract's provisions as relevant in this case; and (3) it is implausible that anyone with knowledge of seniority rights and contracting out cases replete in the labor relations authorities would not be on notice that labor agreements contain clauses providing, *inter alia*, for seniority and performing the employer's work. (*infra*, at 41-42).

crew questions and, therefore, no basis for an automatic exemption under section 11341 in any event.

A. The Commission Has Consistently Excluded Itself From Participating In Or Deciding Labor Relations Matters.

As early as 1952, the ICC in *Gulf, M. & O. R.R. Abandonment,* 282 I.C.C. 311, 331-32 (1952), claimed: "This Commission, over a long period of years, has uniformly held that it has no power to reform contracts or to relieve carriers of their financial obligations thereunder * * *." In this connection, the Commission continued:

> The applicant fails to draw the distinction between conditions which affect only the applicant and give it the alternative of doing one thing or another, and conditions which would impair State laws or vested rights of the parties. The latter we may set aside only upon a clear grant of authority similar to that contained in Section 5(11) [now 49 U.S.C. §11341].
>
> * * * [W]e are of the opinion that we are not authorized by order to declare that the obligations created by the contract between the applicant and the Illinois Central are set aside other than to the extent necessary to effect a compliance with our certificate * * *.

Id., 335.

Subsequently, in *Southern Railway - Control - Central of Georgia Ry.*, 331 I.C.C. 151, 170 (1967), the Commission expressed the view that the exemption granted by section 11341 did not extend to those proposals before the ICC which dealt with the applicant's intention concerning rail labor. As to the employees' contractual rights, including work rights, the Commission concluded:

> By its terms, section 5(11) applies only to anti-trust and other restraints of law from carrying "into effect the transaction so approved * * *." Neither the Washington Agreement nor the specific collective bargaining agreements between these roads and their employees is such a restraint, for indeed section 5 transactions have been successfully consummated in full compliance with such terms * * *.
>
> The designated "exclusive and plenary power" of the Commission in section 5(11) cannot be so broadly construed as to brush aside all laws—be they statutorily created anti-trust laws or voluntary contractual agreements made binding by the force of law * * *.

From this foundation, the ICC, prior to this case, consistently refused to become involved in labor matters. For example, in *Leavens v. Burlington Northern, Inc.*, 348 I.C.C. 962 (1977), a case involving an attack by an individual employee on the protective conditions resulting from a merger which had been agreed to by the union and the railroad, the Commission explained:

> The Commission did not intend to place itself in the fields of collective bargaining or labor management relations nor do the provisions of the Interstate Commerce Act require it. We should be careful so that we do not, because of lack of expert competence, contravene the national policy as to labor relations.

Id., 975. In a concurring opinion, Commissioner Gresham said that there is "no statutory basis for our intrusion in any way into the collective bargaining process." *Id.*, 983.

On the heels of this decision, the Commission declined to become involved in a crew assignment dispute, stating in terms apropos to this case:

That the crew assignment provision was not imposed by the Commission in the exercise of its jurisdiction under section 5(2)(f) of the Act but is a provision negotiated into the agreement by the ICG and the C&IM; that the Review Board expressly asserted the Commission's subject matter jurisdiction solely over matters affecting transportation services and determined only that this provision and other provisions in the agreement would have no adverse transportation effects; that as to all other subject matters including matters relating to labor relations as may fall within the purview of the Railway Labor Act the Board declined jurisdiction over such questions; and that, the Commission [has] no jurisdiction to either impose crew assignment provisions or to remove said provisions * * *.

Illinois Central Gulf R.R. - Trackage Rights - Chicago & Illinois Midland Ry. Co., Finance Docket No. 28046 (Feb. 15, 1977), J.A. 7-8.

The Commission also has held that it "has no authority to involve itself" in disputes arising out of employee protective conditions in which it has prescribed arbitration "in lieu of a Commission proceeding as the remedy for employee complaints." See *Brotherhood of Locomotive Engineers v. Louisville & N. R.R. and Missouri Pacific R.R.*, Finance Docket Nos. 29733 and 29786 (June 10, 1982) (Slip op. 5-6), on appeal to the U.S. Court of Appeals for the D.C. Circuit, Case No. 82-1944; and *Haskell Bell v. Western Maryland Ry.*, 366 I.C.C. 64, 67 (1982).

In *Brotherhood of Locomotive Engineers v. Chicago & N.W. Transportation Co.*, 366 I.C.C. 857 (1983), the ICC denied an appeal by the BLE from the dismissal of its

complaint alleging that the Chicago and North Western was operating over a line of the Indiana Harbor Belt in violation of 49 U.S.C. § 11343, thereby denying locomotive engineers on the latter railroad of employment and rights under 49 U.S.C. § 11347. Once again the Commission said that it would not become involved in labor management decisions and that it is not responsible for resolving labor controversies. The ICC said:

> BLE wants us, in effect, to arbitrate its dispute with IHB. This we will not do. As we pointed out in *Leavens, supra*, we lack the expertise to place ourselves into the fields of collective bargaining or labor management relations.

Id., 861.

Therefore, in the instant case, BLE reasonably anticipated that, in response to its petition for clarification, the Commission would advise that it had not imposed any crew assignment provisions because it had no jurisdiction to do so, and further would direct the parties to the procedures of the RLA or, at least, to the notice and other Article I, Section 4 procedures contained in the employee protective conditions imposed by it, which, of course, MP, MKT and DRGW have not followed. However, failing to treat these matters uniformly, the ICC then became directly involved in a labor relations matter—a dispute as to which employees shall operate trains.

Surprisingly, this switch in philosophy has not hindered the ICC in recent months from reverting to its original hands-off labor relations policy. In *Santa Fe Southern Pacific Corp. - Control - Southern Pacific Transportation Co.*, Finance Docket No. 30,400 (Dec. 9, 1985), the railroads involved in a consolidation under sections 11343

and 11344 sought an order to compel the rail labor unions to enter into negotiations, and ultimately binding arbitration, concerning implementation of rail employee protective conditions prior to Commission approval of the transaction. Specifically, the carriers asked the Commission to prescribe "procedures, under 49 U.S.C. § 11341, so as to displace the procedures established under any contrary provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (RLA)." The Commission held:

> The petition presents two issues—whether we have the authority to grant the relief and, if so, whether we should do so. Applicants have not persuaded us on either basis that we could or should supercede (sic) RLA and alter existing labor agreements in advance of a decision on the merits of this case or a determination of the level of employee protection that may be imposed if the merger is approved. The decision in *Southern Ry. - Purchase - Kentucky & Indiana Terminal R.R.*, F.D. No. 29690, served March 3, 1982 (unpublished), (K&ITR), does not support applicants' request. There we declined to get involved in the collective bargaining process by enjoining, at the request of rail labor, negotiations that were proceeding under the *New York Dock* conditions. Here we are again being asked to affirmatively become involved in the collective bargaining process by mandating negotiations and, if necessary, binding arbitration and we similarly decline to do so. Therefore, we will deny the petition.

See App. A, *infra*, at A1.

Later, in *Lackawanna County Railroad Authority, Inc. - Exemption From Regulation*, Finance Docket No. 30628 (Jan. 24, 1986) (App. B, *infra* at A3), *appeal pending*, No. 86-3231 (3rd Cir.), in which the Commission exempted Lackawanna Valley Railroad from the requirements of 49 U.S.C. Subtitle IV, the Commission rejected BLE's contention that the Commission may not, through the exemption process in which no hearing is held, deny employee protection and at the same time relieve the owning carrier's work assignment commitment to its employees in consideration of a wage deferral agreement. The Commission said:

> Whether or not the agreement between D&H and its employees is a matter that applies to these transactions is outside of our jurisdiction. Therefore, our refusal to impose labor protection, in the face of this agreement is not an abuse of discretion, and would not resolve any conflict [sic] it.[14]

App. B at A9.

Thus, consistently over the years prior to this case, and even now, the Commission has taken the position that the issues of crew selection and seniority are to be handled under the collective bargaining prescribed by the RLA and that it lacks the expertise and authority to deal with labor management relations. Accordingly, it is beyond cavil that the Commission did not consider or even

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14. In *Penn Central Merger - Matter of Larry Zapp*, Finance Docket No. 21989 (I.C.C. May 13, 1986) resulting from the decision in *Zapp v. United Transportation Union*, 727 F.2d 617 (7th Cir. 1984), the Commission said with respect to its role in imposing employee protective conditions and any determination as to the propriety of Zapp's seniority standing resulting from the implementation of the Commission's order:

> This responsibility does not require nor has it been the intention of this Commission to displace collective bargaining as the appropriate vehicle for establishing seniority, or to displace arbitration as the proper means for determining whether an employee is affected by a transaction and the specific benefits occurring from that status.

think about the crewing issues in its October 20, 1982 decision.[15]

B. The Commission Failed To Provide Any Justification For Its View That The Carriers Are Automatically Immunized From The RLA And Their Contractual Obligations.

Although the ICC has broad discretionary power, that authority is not unlimited. Its decisions are subject to review on the basis of whether the law has been properly interpreted and applied and whether the decision question has been based on substantial evidence. *Northern Lines Merger Cases*, 396 U.S. 491, 503 (1970)

In the instant case, the ICC once again appears to have made a result-oriented decision which would impose its will over that of Congress. In vacating another result-oriented decision, the Court of Appeals for the District

15. Notwithstanding the most recent pronouncements of the ICC, on August 22, 1985, the Commission said that the provisions of both the WJPA and the RLA have been "reflected and subsumed in the conditions imposed by the Commission." *Maine Central R.R., Georgia Pacific Corp., Canadian Pacific & Springfield Terminal Ry. - Exemption From 49 U.S.C. 11342 and 11343*, Finance Docket No. 30532 (Aug. 22, 1985), *appeal pending*, No. 85-1636 (D.C. Cir.). See Pet. Add. 40a, at 49a. If, as the Commission contends therein, the Commission's labor protective provisions provide for compulsory binding arbitration "to arrive at implementing agreements if the parties are unable to do so, so that approved transactions can ultimately be consummated," the ICC's application of section 11341 as a self-executing exemption in the instant case deprived the employees represented by BLE on MP of the use of those procedures. However, a full reading of that opinion establishes that the Commission, in response to the decision below, is now saying that the RLA, the WJPA, and even the ICC imposed protections of the collective bargaining rights of the affected employees are preempted and set aside by its order exempting a financial transaction from the requirements of the ICA. In short, the Commission appears to be coming up with arguments that were not even conceived at the time it entered its order on October 20, 1982.

of Columbia Circuit recently said that the ICC "cannot hide the standards under which it operates, for we are unable to evaluate whether its reasoning meets the reasoned decision making requirement unless we know against what standards its factual findings have been judged." *Coal Exporters Ass'n. v. United States*, 745 F.2d 76, 99 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2151 (1985). *Also see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Until this case, the Commission has interpreted the ICA as not providing it with jurisdiction over labor relations and collective bargaining matters and has held that determinations of seniority and crew assignment matters are best left to the procedures of the RLA and the imposed employee protective conditions. The Court of Appeals below appropriately noted that the "ICC's analysis of the necessity for waiving the Railway Labor Act, however, is virtually nonexistent," and "the Commission did not give a shred of reasoning to support its view that completion of the transaction required shielding crew selection from the Railway Labor Act." Pet. App. 19a.[16] Thus, it follows that:

16. To support its interpretation and application of section 11341 as self-executing in this case, the ICC apparently relies on *Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963), although the Commission had never adopted that reasoning previously. Actually, that case, which arose from a declaratory action by a carrier, only stands for the proposition that to the extent the involved railroads and unions have entered into an agreement, which is approved by the Commission and made part of its conditions, the carrier is removed from obstacles posed by the RLA that would defeat the consolidation. *See also* opinion of court below, at Pet. App. 18a n.6, further distinguishing the Eighth Circuit's decision. Here there is no voluntary agreement setting the levels of employee protection. Nevertheless, at most, that decision holds that the compulsory arbitration provided by that agreement is the procedure to be followed in

(Continued on following page)

Whatever deference must be accorded "the interpretation of a statute by an agency charged with its enforcement", *Meade Township v. Andrus*, 695 F.2d 1006, 1009 (6th Cir. 1982), such an agency, at the very least, must be held to its own interpretation. While an agency may not be "disqualified from changing its mind", it must give sufficient reasons for its new interpretation. Otherwise, a reviewing court cannot "approach the statutory construction issue . . . with[] regard to the administrative understanding of the stataute[]." *NLRB v. Local Union No. 103*, 434 U.S. 335, 351 (1978); see majority op. at 1186. No reasons whatsoever were given by the ICC for the broad change in its interpretation of the Act in the instant case.

Crounse Corp. v. ICC, 781 F.2d 1176, 1198-1199 (6th Cir. 1986) (Timbers, J., dissenting), *petition for reh'g denied*, 787 F.2d 1031 (6th Cir. 1986).

On this basis alone, the Court of Appeals correctly held that the Commission could not automatically rely upon

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Footnote continued—

adjusting the seniority rights of the employees affected by the consolidation. Rather than detracting from the decision below, the Eighth Circuit's expressions further it by establishing that the merits of the subject were not touched by the Commission's order; section 11341 merely activated the ultimate decision-making procedure as to a direct aspect of the consolidation. The dichotomy in ICC's reasoning is typified by its decision of October 19, 1983 in which it denied reconsideration, when it attempted to distinguish its decisions in *Illinois C. G. R.R. - Trackage Rights - over Chicago & I. M. Ry.*, Finance Docket No. 28046 (Feb. 15, 1977), and *Cairo Terminal Railroad - Trackage Rights Exemption - Illinois C. G. R.R.*, Finance Docket No. 30138 (May 17, 1983), that the Commission would not inject itself in crew assignment and other labor disputes, on the basis that the former case involved a negotiated agreement and the latter arose in an exemption proceeding under 49 U.S.C. §10505. Obviously, the Commission is saying the exemption is not automatic in those instances.

section 11341, but, "must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction." Pet. App. 45a.

The Commission's decision on clarification that its approval automatically immunized the carriers from the procedures of the RLA, and even the Commission-imposed protective conditions, clearly overreaches its authority. And the purported basis for that decision, *i.e.*, the references in the applications to the use of the tenant railroad's employees and the approval of the trackage rights agreements in subsequent compensation hearings, no longer exists in the usual trackage rights case. *See Railroad Consolidation Procedures - Trackage Rights Exemption*, Ex Parte No. 282 (Sub-No. 9) (April 19, 1985); 49 C.F.R. §§ 1180.2, 1180.6. Since trackage rights agreements have been afforded a class exemption, except when sought as conditions to a rail consolidation, no application need be filed with the ICC and no forum is available to raise the issues the Commission contends should be raised in the public interest phase of its proceedings. Under such circumstances the exemption cannot be self-executing, because there is no basis for its invocation.

C. The Court of Appeals Correctly Held That The Commission Must Make A Finding Of Necessity To Exempt Crew Selection From The RLA And Collective Bargaining Procedures.

1. The exemption contained in section 11341 is not as broad as asserted by the ICC but only extends by its terms to those exclusions "necessary to let that person carry out the [approved or exempted] transaction." Thus,

the ICC's authority to approve trackage rights agreements, while it may be plenary, is not absolute or without meaningful limitations.

In *City of Palestine v. United States,* 559 F.2d 408 (5th Cir. 1977), *cert. denied,* 435 U.S. 950 (1978), the Fifth Circuit ruled that the ICC had exceeded its authority under section 11341 by abrogating certain agreements requiring one of the railroads involved in a consolidation to maintain an office and a certain percentage of its work force in Palestine. Although an agreement may be burdensome, that Court of Appeals said:

> In its grant of authority, Congress did not issue the ICC a hunting license for state laws and contracts that limit a railroad's efficiency unless those laws or contracts interfered with carrying out an approved merger.

Id., 414.

Congress, as this Court found in *Schwabacher v. United States,* 334 U.S. 182 (1948), has manifested an intention not to abrogate state law unless it interferes with carrying out an approved merger. That principle is much stronger here, for 49 U.S.C. § 11347 would be superfluous if the RLA and the contractual obligations of the railroads to their employees were automatically exempted. The employees would be deprived of their statutorily guaranteed continuation of collective bargaining rights, rates of pay, rules and working conditions embodied in agreements, and their rights under the RLA. In *Schwabacher v. United States, supra,* the ICC declined in a consolidation to consider claims of dissenting shareholders under state law, because it thought it lacked jurisdiction. *Id.*, 201-202. This Court later remanded to

the Commission to make specific findings whether the stock valuation was just and reasonable to these claimants with directions to consider state law to the extent it might affect the intrinsic value of their stock, even though the Commission had found the public interest in the plan as a whole was just and reasonable. In this case, to the extent that the Commission refused to specifically consider and find that the resolution of crew manning was necessary to the transaction and that the specific terms were just and reasonable, it erred.

Moreover, the Fifth Circuit has held that the term "transaction" used in 49 U.S.C. §§ 11341(a) and 11343 (a) is, for exemption purposes, limited to the transfer of the right to DRGW and MKT trains to use certain MP and UP lines and does not extend to the subject of the employees manning those trains. *Texas & N.O. R.R. v. Brotherhood of Railroad Trainmen,* 307 F.2d 151 (5th Cir. 1962). In sum, the section 11341 exemption is limited to those laws and statutory proscriptions which prevent the consummation of the transaction authorized by the ICC, and the scope of that exemption is limited to the powers "necessary to let the person carry out the transaction."

2. In light of the limitations upon the ICC's powers, there must be adequate and proper findings by it to support any decision that it, in fact, determines that termination of the employees' right to participate in crew selection is necessary. *SEC v. Chenery Corp.,* 332 U.S. 194 (1947). In short, the grounds for its decision must be clear and to the point, for the reviewing court "must know what a decision means before the duty becomes ours to say whether it is right or wrong." *Id.* at 197, citing *United States v. Chicago, M., St.P.&P. R.R.,* 294 U.S. 499, 511 (1935).

These principles were given further meaning in *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962), which involved the relationship of the ICA to the federal labor relations laws. Unionized trunk line motor carriers refused to handle goods from nonunion short line truckers under the "hot cargo" clauses in their labor contracts. The short line carriers organized another company and applied to the ICC for authority to act as an interstate carrier, and the ICC granted the application. Shortly thereafter, the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, was amended, placing in issue the validity of the union induced boycott. A three-judge district court affirmed. In reversing, this Court found that the Commission had a choice of remedies, and held that the ICC had failed to properly justify its choice of remedy and disclose the grounds for its order. In discussing the relationship between the ICA and the labor laws, the Court said:

> . . . Commission should be particularly careful in its choice of remedy, and should have been particularly careful, because of the possible effects of its decision on the functioning of the national labor relations policy. The Commission acts in a most delicate area here, because whatever it does affirmatively . . . may have important consequences upon the collective bargaining processes between the unions and employees. The policies of the Interstate Commerce Act and the Labor Act necessarily must be accommodated, one to the other.
>
> * * *
>
> Implicit in this analysis is a recognition that if either agency is not careful it may trench upon the other's jurisdiction, and because of lack of expert competence, contravene the national policy as to transportation or labor relations.

Id., 172-173.

In the instant case, the ICC, in denying clarification of its order and application of the employee protective conditions imposed by it, states that its earlier orders "unambiguously specified that trackage rights tenants may perform operations using their own crews." J.A. 36. However, when those prior decisions are examined, it becomes apparent that the ICC merely indicated that the tenants proposed to use their own crews, not that this was a requirement. Clearly, the ICC did not examine the terms of the trackage rights agreements and made no findings that could be a basis for its order.

However, in its "clarification", the ICC did not even stop at this point. It claimed that it meant to grant the railroads immunity from the RLA and to give them the right to select the employees of MKT or DRGW to perform work belonging to MP employees, work which is protected by the Railway Labor Act and which cannot be taken away without an agreement reached pursuant to said Act.[17] If a result like this could be reached by the ICC, it could be accomplished only after the ICC attempted to accommodate the policies of the RLA with those of the ICA. As set forth above, the accommodation would have to be explained by specific findings and supported by substantial evidence which shows that the ex-

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17. *See, e.g., St. Louis Southwestern Ry. v. Brotherhood of Railroad Signalmen*, 665 F.2d 987 (10th Cir. 1983), *cert. denied*, 456 U.S. 945 (1982), which held that a carrier, subject to an employee protective agreement imposed by the Commission in the purchase of certain lines of a bankrupt rail carrier, violated section 6 of the RLA, 45 U.S.C. § 156, by contracting out work on the purchased line.

emption under section 11341 is necessary to enable the trackage rights tenants to carry out the transaction approved by the ICC, *i.e.*, operation of MKT and DRGW trains over MP track, and that without such exemption, the trackage right operations could not be effectuated.

3. While the Government and MKT insist that crew mannings could be an obstacle to effectuating a transaction, there are no hard facts from which to draw that inference. Although railroad employment has declined from about 1,250,000 employees to approximately 300,000 over the years—a goodly portion of such decline resulting from consolidations, abandonments and other carrier financial transactions pursuant to the ICA—the lesson of the last four to five decades is that strikes or threats of major disruptions have not presented any obstacle to the completion of those transactions. And DRGW has conducted its trackage rights operations for three years with MP crews, which again proves that such operations are feasible and fiscally responsible.

Further, due to the procedures within the unions to handle such matters (see *supra*, 4), crew manning issues are unlikely to prevent trackage rights applications from being implemented. Although railroad employees do consider themselves as having a proprietary interest in the lines of rail over which they operate (*see, e.g., Primakow v. Railway Express Agency, Inc.*, 60 F. Supp. 691 (E.D. Wis. 1945)), as the dissenting opinion in the court below suggests, the use of the owning carrier's operating crews, in whole or part, should not constitute any financial hindrance to the tenant line due to the labor structure in the industry.

D. Application Of The RLA Procedures Would Not Impede The Implementation Of Commission-Approved Transactions.

The policy of encouraging collective bargaining, thereby granting railroad employees a voice in their employment life, pervades the federal railroad labor relations law. In fact, the dictation of crew assignments and other labor relations matters by railroads under the alleged imprimatur of Commission approval runs counter to the Congressional policy of encouraging collective bargaining "in order to prevent if possible, wasteful strikes and interruptions of interstate commerce." *Detroit & T. S. L. R.R. v. United Transportation Union*, 396 U.S. 142, 148 (1969). Thus, while the RLA procedures embodying that policy do not impede implementation of Commission approved transactions, even if they did, Congress, not the ICC, is the body empowered to modify those procedures.[18]

During 1923-24, the federal administration under Presidents Harding and Coolidge asked for modifications in the Transportation Act of 1920 to remedy weaknesses, particularly in the area of labor management relations. *The Railway Labor Act at Fifty*, National Mediation Board (G.P.O., Washington, D.C. 1976), at 7. In this context, the 1924 platform of the Republican Party proposed enactment of a Railway Labor Act, stating:

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18. Congress considers those procedures appropriate for even bankrupt railroads:

> Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act (45 U.S.C. 151 et seq.) except in accordance with section 6 of such Act (45 U.S.C. 156).

11 U.S.C. § 1167, Pub. L. No. 95-598, 92 Stat. 2642 (1978)

> Collective bargaining, mediation, and voluntary arbitration are the most important steps in the maintaining of peaceful labor relations and should be encouraged. We do not believe in compulsory action.

Id.

Under the urging of President Coolidge, a committee of railway executives and union representatives produced a draft of a bill in 1925 which ultimately became the RLA. *Id.* at 8. The RLA, which has been amended from time to time, has been the subject of decisions of this Court in a long line of cases over the past six decades. *Texas & N.O. R.R. v. Brotherhood of Railway and Steamship Clerks,* 281 U.S. 548 (1930), upheld the constitutionality of the Act, holding, among other things, that "the major purpose of Congress in passing the Railway Labor Act was to 'provide machinery to prevent strikes.'" *Id.*, at 565. In its numerous decisions on this subject, the Court has noted "the Act established rather elaborate machinery for negotiation, mediation and voluntary arbitration, and conciliation." *Detroit & T. S. L. R.R. v. United Transportation Union,* 396 U.S. 142, 148-149 (1969).

Although from time to time measures have been advanced to provide for compulsion and anti-strike laws, the RLA has served as the basis for labor management harmony and industrial peace in the railroad industry. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 379 (1969). The choice made by Congress consistently has been to favor collective bargaining, which is conceived necessary to the long-term maintenance of industrial peace in the railroad sector.

In *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960), this Court was confronted with

a somewhat similar situation. That decision arose out of the filings by the carrier with state public utility commissions to eliminate various stations, which would have resulted in loss of jobs for some station agents and telegraphers. The carrier refused to negotiate with the union on the ground that the request did not raise a bargainable issue under the Railway Labor Act and that the state commissions had the power to determine whether station agencies could be discontinued, which power could not be evaded by entering into a bargaining agreement. This Court found the legislative history and language of the legislation revealed a non-interventionist policy in labor disputes in order to promote freedom of association, organization, representation and negotiation on the part of workers. *Id.*, 336. Rejecting the argument that employees have "no collective voice to influence railroads to act in a way that will preserve [their] interests" (*id.*, 338), the Court opined that both the "Railway Labor Act and the Interstate Commerce Act recognized that stable and fair terms and conditions of railroad employment are essential to a well-functioning national transportation system." *Id.*, 337.

With respect to the same issue now raised by the ICC's decision herein, the Court rejected the concept that the Interstate Commerce Act abrogates the right of the carrier's employees to negotiate on job security and stability:

> It would stretch credulity too far to say that the Railway Labor Act, designed to protect railroad workers, was somehow violated by the union acting precisely in accordance with that Act's purpose to obtain stability and permanence in employment for workers. There is no express provision of law, and

> certainly we can infer none from the Interstate Commerce Act, making it unlawful for unions to want to discuss with railroads actions that may vitally and adversely affect the security, seniority and stability of railroad jobs.

Id., 339-340.

In response to the carriers' argument that negotiations and possibly continued operation of service and lines would be wasteful and contrary to the policy expressed in the Interstate Commerce Act to foster an efficient national railroad system, the Court said that "Congress has acted on the assumption that collective bargaining by employees will also foster an efficient national railroad service." *Id.*, 342.

Moreover, the Fifth Circuit has clearly held that the term "transaction" used in 49 U.S.C. §§ 11341(a) and 11343(a) is for exemption purposes limited to the transfer of the right to DRGW and MKT trains to use certain MP and UP lines and does not extend to the subject of the employees manning those trains. In *Texas & N.O. R.R. v. Brotherhood of Railroad Trainmen,* 307 F.2d 151 (5th Cir. 1962), that Court of Appeals in examining this question concluded that the immunity granted by what is now section 11341(a) did not extend to those proposals before the ICC which dealt with the applicant carrier's intentions concerning rail labor. In so holding, the court relied upon the terms of the statute and upon prior Commission interpretations of its authority. *See also City of Palestine v. United States,* 559 F.2d 408 (5th Cir. 1977), *cert. denied,* 435 U.S. 950 (1978), which held that the Commission may nullify state law only when its restraints absolutely prohibit a consolidation.

These cases establish that the Commission has not been given a license to eliminate contracts and to relieve rail carriers from their collective bargaining obligations. This callous and cavalier disregard of the employment and seniority rights of the employees of the owning railroad assuredly has generated labor unrest in the instant case and may very well threaten the success of trackage rights and other future transactions, if the Commission's view is sustained.

Should the Carriers not be relieved from the RLA, any controversy that may arise relative to labor relations matters can nevertheless be adequately handled under the RLA's procedures and, if necessary, as to "the selection of forces from all employees involved" and "any assignment of employees made necessary by the transaction" through the notice, negotiation and arbitration provisions set forth in Article I, Section 4 of the Commission imposed employee protective conditions.

However, as the Second Circuit concluded in *New York Dock Ry. v. United States,* 609 F.2d 83, 101 (2d Cir. 1979):

> . . . [T]he ICC's imposition of these labor protective conditions may place substantial hurdles in the path of rail carrier management seeking to consummate in a smooth and rapid manner transactions covered by 49 U.S.C. §11343-11346. If that proves to be the case, however, the solution would appear to be in an appeal to Congress, rather than to the courts.

Seemingly, the same observation would be applicable to any obstacles the RLA may impose in this case.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.[19]

Respectfully submitted,

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19. In light of the ICC's ruling in the *Southern - Central of Georgia* Case, *supra*, and its consistent disclaimer of jurisdiction in crew manning matters, as well as the fact that crew selection on its face is not a necessary facet of nor an impediment to a trackage rights transaction, remand to the ICC would not be appropriate. BLE, therefore, suggests that the parties be left to their remedies under the RLA, as the court below decided in its initial opinion, or, insofar as selection and assignment of work forces to the ICC imposed employee protective conditions.

APPENDIX A

Decision in Santa Fe Southern Pacific Corporation - Control - Southern Pacific Transportation Company

INTERSTATE COMMERCE COMMISSION
DECISION NO. 21

Finance Docket No. 30400[1]

SANTA FE SOUTHERN PACIFIC CORPORATION - CONTROL - SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: December 9, 1985

By emergency petition for extraordinary relief filed October 31, 1985, the Atchison, Topeka and Santa Fe Railway Company (ATSF), Southern Pacific Transportation Company (SPT), and Santa Fe Southern Pacific Corporation (SFSP), (the railroads), seek an order authorizing ATSF and SPT to compel rail labor unions to enter into negotiations, and ultimately binding arbitration, concerning implementation of rail employee protective conditions. These negotiations would be conducted in anticipation of possible approval of the consolidations that are presently being considered by the Commission. While not asking the Commission to determine, at this time, whether to approve the merger, or what level of employee protection will be imposed if approved, applicants seek a determination concerning the appropriate procedures for resolving any disputes that may arise in connection with negotiating changes in labor agreements necessary to implement the transactions if approved. This would involve prescribing procedures, under 49 U.S.C. 11341, so as to displace the procedures established under any contrary provisions of

1. Embraces Finance Docket No. 30400 (Sub-Nos. 1-20 and MC-F-15628).

the Railway Labor Act, 45 U.S.C. 151 *et seq.* (RLA). The Railway Labor Executives' Association (RLEA) has replied. The railroads filed a petition for leave to file a reply to RLEA's reply. The railroads simultaneously filed a reply. The petition for leave to file a reply is granted and the reply is accepted into the record.

As pertinent here, RLEA argues that in order to make the findings necessary to remove the entire transaction from the RLA at this time, the Commission must prejudge the merits of the consolidation and alter prior labor agreements. It is suggested that seniority and other rights of rail employees will be ignored or subjected to unilateral changes as the result of imposing, at this time, the procedures set out in *New York Dock Ry - Control - Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979). The unions request oral argument.

The petition presents two issues—whether we have the authority to grant the relief and, if so, whether we should do so. Applicants have not persuaded us on either basis that we could or should supercede RLA and alter existing labor agreements in advance of a decision on the merits of this case or a determination of the level of employee protection that may be imposed if the merger is approved. The decision in *Southern Ry. — Purchase — Kentucky & Indiana Terminal R.R.*, F.D. No. 29690, served March 3, 1982 (unpublished), (K&ITR), does not support applicants' request. There we declined to get involved in the collective bargaining process by enjoining, at the request of rail labor, negotiations that were proceeding under the *New York Dock* conditions. Here we are again being asked to affirmatively become involved in the collective bargaining process by mandating negotiations and, if necessary, binding arbitration and we similarly decline to do so. Therefore, we will deny the petition.

APPENDIX B

Decision in Lackawanna County Railroad Authority, Inc. - Exemption From Regulation

INTERSTATE COMMERCE COMMISSION
DECISION

Finance Docket No. 30628

LACKAWANNA COUNTY RAILROAD AUTHORITY, INC. - EXEMPTION FROM REGULATION

Decided: January 24, 1986

We are denying the petitions to reopen filed by the Pennsylvania State Legislative Board-United Transportation Union (UTU), the Brotherhood of Locomotive Engineers (BLE), and the Brotherhood of Maintenance of Way Employees (BMWE).

In a decision served on March 22, 1985,[1] we exempted the Lackawanna County Railroad Authority, Inc. (LCRA) from 49 U.S.C. Subtitle IV. That exemption also covered LCRA's: (a) acquisition of the following lines from the Delaware and Hudson Railway Corporation (D&H) in Lackawanna County, PA: (1) a portion of the Carbondale Branch between MP 196.8 in the Borough of Moosic and MP 174.59 in the Township of Fell, a distance of 22.21 miles; and (2) the 1.2-mile Vine Street Branch; and (b) acquisition of incidental trackage rights over D&H between MP 130.4 at Minooka Junction and MP 133.8 at Bloom Junction. We also exempted Lackawanna Valley Railroad Corporation (LVRC) from the prior approval requirements of 49 U.S.C. 10901 to operate the above-described lines.

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1. 50 Fed. Reg. 11950 (March 26, 1985).

PRELIMINARY MATTERS

BLE moves for leave to late-file a petition to join in UTU's petition to reopen. LCRA, LVRC, and D&H jointly move to strike BLE's motion on the grounds that the decision served March 22, 1985 is administratively final as to BLE, and that BLE has not shown material error, new evidence, or substantially changed circumstances to justify reopening. However, our rules of practice are to be construed liberally (49 C.F.R. 1100.3), and we find that BLE's petition does not broaden the issues raised in UTU's petition. Accordingly, BLE's motion for leave to late-file is granted, and the motion to strike is denied.

BLE replied to the motion to strike, arguing that equitable considerations relating to a wage deferral agreement between labor and D&H preclude transfer of a D&H line without imposition of labor protective conditions. D&H, LCRA, and LVRC responded to BLE's arguments and move to strike them on the grounds that some are redundant and the above argument broadens the issues. Since those carriers have been able to respond and thus have not been prejudiced, we will deny their motion to strike.

On July 11, 1985, BMWE late-filed a letter-petition stating that it endorses UTU's and BLE's petitions to reopen. It also attached a brief verified statement, to which D&H, LCRA, and LVRC replied. Although BMWE's filing is late, and we admonish it to act promptly in the future or its pleadings will be rejected, we will accept its petition since it relies primarily on the record already made and D&H, LCRA, and LVRC have been able to respond to it.

BACKGROUND

LCRA, a noncarrier municipal corporation, entered an agreement with D&H to acquire the two line segments and trackage rights. It plans to rehabilitate the lines, but will not hold itself out as an operator. Instead, operations will be performed by LVRC.

UTU, BLE, and BMWE have petitioned to reopen because we did not impose employee protection conditions on D&H when we granted the exemptions. D&H embargoed the northern 16-mile segment in December 1983 because of poor track conditions. It operated over the southern 7-mile portion on an "as needed" basis, which was usually two or three times a week. D&H did not file an abandonment application.

DISCUSSION AND CONCLUSIONS

Petitioners first argue that we should dismiss the exemption petitions because the purchase and operating agreements are not in evidence. However, detailed proof for exemptions is neither required by 49 U.S.C. 10505 nor by our exemption procedures. Ex Parte No. 400, *Modification of Procedure For Handling Exemptions Filed Under 49 U.S.C. 10505*, (not printed), served December 29, 1980.

Petitioners next argue that LVRC's operation of LCRA's line is governed by 49 U.S.C. 11343, because exemption from that section was the relief they requested. We determine which statute governs our deliberations based on an analysis of the actual nature of the transaction. Neither LVRC nor LCRA were carriers when they filed the exemption. Section 11343 is applicable only to transactions where both the buyer and seller of rail property are carriers. *Application Proc. - Construct, Acq. or Oper. R. Lines*, 365 I.C.C. 516, 518 (1982). Section

10901, however, governs rail entry and the creation of new carriers. Since LVRC and LCRA are new carriers, section 10901 would govern this transaction, if it had not been exempted, not section 11343.

Petitioners also contend that we erred in finding that the proposed trackage rights are *de minimis* and purely incidental to the section 10901 acquisition. However, the proposed trackage rights are only 4 miles in length and in concert with the acquisitions constitute a single, new, integrated operating proposal. Since the trackage rights transaction is contemporaneous with and incidental to the section 10901 acquisition, it also falls within section 10901. *See* Finance Docket No. 30505, *Alabama So. R.R. Co. and the Alabama Great S. R.R. Co. - Acqs. Opers. and Trackage Rts. - Exemption,* ..... I.C.C. 2d. ..... (1984).

Petitioners further contend that D&H desires to abandon the involved lines and that it cannot escape liability for employee protection conditions by selling the lines. UTU cites some cases similar to this proceeding (although they did not involve exemptions) in which we imposed abandonment-type labor protection conditions on vendors of the involved lines. Contrary to its assertion, however, imposition of such conditions was discretionary, not mandatory. *See Knox & Kane R. Co. — Petition for Exemption,* 366 I.C.C. 439, 443 (1982) (*Knox*).

Petitioners' assertion that section 10903 governs D&H's discontinuance of its operations is incorrect. We have uniformly held that noncarrier acquisition of a rail line is governed by section 10901. *Application Proc. — Construc. Acq. or Oper. R. Lines,* 365 I.C.C. 516 (1982). This policy has been applied consistently in granting exemption from the requirements of 49 U.S.C. 10901 where the proposed transaction would result in the transfer of a rail line slated for abandonment by a carrier to a noncarrier proposing to continue rail operations. *See, e.g.,* Finance Docket No. 30462, *Burlington, C.R. & N. Ry. Co. — Exemption* (not printed), served May 21, 1984, and Finance Docket No. 30431, *Minnesota Valley Transportation Co., Inc. — Southwest — Temporary Exemption* (not printed), served March 16, 1984). The Commission's holding that a certificate of abandonment is not required when a railroad contemplating abandonment sells its line to a noncarrier has been sustained in *Illinois v. United States,* 604 F.2d 519 (7th Cir. 1979); *In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.,* 658 F. 2nd 1149, 1164, 1169 (7th Cir. 1981), *cert. denied,* 445 U.S. 1000 (1982); and *Railway Labor Executives' Assn. v. United States,* 697 F. 2nd 285 (10th Cir. 1983).

Petitioners also argue that *Smith v. Hoboken R. Co.,* 328 U.S. 123 (1946) (*Smith*) requires D&H to abandon its line before LCRA can acquire it. This is an improper reading of *Smith. Smith* was decided under section 77 of the Bankruptcy Act, not the Interstate Commerce Act. More importantly, *Smith* involved an involuntary lease forfeiture situation, not a voluntary sale.

UTU is also incorrect in claiming that the only instances where the Commission has permitted a carrier to transfer its line to another person without imposition of employee conditions involve "entire line" abandonments. *Knox, supra,* for example, which involved acquisition of track from the Baltimore and Ohio Railroad Company, did not involve an entire line abandonment. Furthermore, in that decision, at 443-444, we stated several reasons why imposition of protective conditions on vendors may have effects contrary to objectives of the rail trans-

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portation policy. We concluded that "although the imposition of the *Oregon III* conditions on a vendor may at times be justified, there are countervailing considerations which dictate that this policy not be reflexively applied." No showing justifying the imposition of labor protective conditions has been made.

BMWE alleges that five D&H employees have already been adversely affected by a change in the location of the headquarters to which they report. It notes that, prior to the sale of the Carbondale Branch, D&H closed its facilities at Carbondale, Green Ridge, and Wyoming Avenue in anticipation of the sale. It predicts that additional employees will be displaced or furloughed due to the sale unless labor protective conditions are imposed on D&H. The carriers reply that BMWE's allegations are unsubstantiated and that it waited so long to submit its views that it requests retroactive application of labor protection on a consummated transaction.

The facts BMWE has outlined are similar to those in *Knox, supra*. In *Knox* a number of employees were adversely affected by the transaction. However, the Commission found that the rail transportation policy considerations concerning fair wages and safe and suitable working conditions in the industry were outweighed by policy objectives to foster sound economic conditions in transportation and to ensure the development and continuation of a sound rail transportation system. We reach the same conclusion here and will not impose protective conditions on D&H based on BMWE's arguments.

BLE argues that equity demands the imposition of protective conditions because D&H and 21 labor organizations, including BLE, signed a still-effective 12 percent wage deferral agreement as a means of D&H reaching self

sufficiency. One of the considerations in this agreement was the creation of job stability for the D&H employees who gave up 12 percent of their wages. BLE quotes Item 11 of its agreement in which D&H:

> [A]grees to maintain a rigid observance of all existing contract provisions relating to the transfer of work to other D&H work sites *or to other rail companies,* particularly those owned or sought to be owned by GTI. (Emphasis added).

BLE contends that the agreement commits D&H to using its employees to serve those lines transferred to another, and that D&H can change its commitment only by serving notice under section 6 of the Railway Labor Act and negotiating a change. BLE further argues that the Commission may not, through the exemption process, relieve D&H of its commitment, and that failure to grant D&H's employees protection based on D&H's contractual representation to them would constitute an abuse of discretion.

D&H, LCRA, and LVRC reply that this is an issue beyond the Commission's jurisdiction because it involves disputes as to the interpretation of labor agreements that should be resolved pursuant to their provisions and the Railway Labor Act. They also contend that sale of a rail line does not constitute farming out or transfer of work.

Whether or not the agreement between D&H and its employees is a matter that applies to these transactions is outside of our jurisdiction. Therefore, our refusal to impose labor protection, in the face of this agreement is not an abuse of discretion, and would not resolve any conflict [sic] it.

The prior decision inadvertently failed to exempt LVRC from the prior approval requirements of 49 U.S.C. 11301 to permit it to issue $50,000 in common stock to provide initial working capital, although such an exemption was clearly intended by the discussion in the decision. Accordingly, we will revise the second ordering paragraph in our prior decision to exempt the stock issuance.

We conclude that the petitions for reopening should be denied, and that employee protective conditions are not required.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. BLE's and BMWE's motions for leave to join in UTU's petition are granted.

2. The motions of LCRA, LVRC and D&H to strike are denied.

3. Ordering paragraph number 2 in the prior decision is revised to read:

> 2. Lackawanna Valley Railroad Corporation is exempted from the prior approval requirements of (a) 49 U.S.C. 10901 to operate the line, and (b) 49 U.S.C. 11301 to issue $50,000 in common stock.

4. The petitions to reopen are denied.

5. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre and Lamboley. Commissioner Lamboley concurred with a separate expression.

JAMES H. BAYNE
(SEAL) Secretary

COMMISSIONER LAMBOLEY, concurring:

Although I concur in the result, I do not share the majority's discussion and conclusion on certain issues.

First, I continue to believe that as structured, the trackage rights, while an integral part of the transaction, are more properly encompassed by § 11343. § 11343 and § 10901 are compatible and not to be construed as mutually exclusive. See *People of Ill. v. I.C.C.*, 604 F.2d 519 (7th Cir. 1979).

Second, the decision fails to adequately discuss the common carrier obligations in relation to the purchase of the *active*, rail line. The majority terms both LVRC and LCRA as new carriers, yet the original decision notes only that LVRC assumes the common carrier obligation.

The decisions are silent and potentially confusing as to whether LCRA may have any common carrier obligation, notwithstanding LVRC's current assumption of obligation.[1]

Third, the decision fails to review the issue whether, for purposes of considering labor protection criteria and

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1. This issue seems squarely raised by (1) the fact LCVA requested exemption from such obligation, and (2) the protestants' arguments on reopening assume that LCRA was not so exempted, and does in fact have a common carrier obligation. Certainly those who are economically interested in and support continued rail service should not be left without Commission clarification of this issue.

the seller's status, there is a conceptual distinction between transactions involving sale of an active rail line and abandonment.[2]

Finally, it is appropriate to point out that meaningful review of labor protection issues are frequently hindered, as here, by the lack of an adequate presentation of specific factual evidence concerning dislocation and economic impact. General conclusionary allegations are simply not sufficient.

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2. This issue, although suggested by the cited Commission's discussion in *Knox & Kane Railroad Co. - Gettysburg Railroad Co. - Petition for Exemption,* 366 I.C.C. 439 (1982) is not reviewed in that case nor in our recent decision in Ex Parte No. 392 (Sub-No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. § 10901,* I.C.C. 2d (served January 15, 1986).